

BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

IN THE MATTER OF SEATTLE)
AUDUBON SOCIETY and)
SIERRA CLUB - CASCADE CHAPTER,)

FPAB No. 87-5

Appellants,)

v.)

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

STATE OF WASHINGTON, DEPARTMENT)
OF NATURAL RESOURCES and SCOTT)
PAPER COMPANY,)

Respondent.)

This matter is an appeal of the approval by Department of Natural Resources of Forest Practices proposed by the Scott Paper Company.

The matter came on before the Forest Practices Appeals Board; Norman L. Winn, Chairman, Claudia Craig, Member. William A. Harrison, Administrative Appeals Judge presided. The hearing was conducted at Mt. Vernon, Washington, on May 24 and 25, 1988.

1 Appellants Seattle Audubon Society and Sierra Club were
2 represented by Andy Stahl, member, and Corrie J. Yackulic, Attorney at
3 Law. Respondent Department of Natural Resources, was represented by
4 Robert K. Costello, Assistant Attorney General. Respondent Scott
5 Paper Company was represented by Daniel D. Zender, Attorney at Law.
6 Reporter Rebecca Winters provided court reporting services.
7 Appellants elected a formal hearing pursuant to RCW 76.09.230.

8 Witnesses were sworn and testified. Exhibits were examined. The
9 parties each presented pro forma findings and conclusions on July 11,
10 1988. Board member Martin Kaatz has reviewed the record. From
11 testimony heard or read and exhibits examined, the Forest Practices
12 Appeals Board makes these

13 FINDINGS OF FACT

14 I

15 This matter arises in Whatcom County in the vicinity of Baker
16 Lake.

17 II

18 Respondent Scott Paper Company owns a 600 acre inholding
19 surrounded by federal property excepting for its frontage on Baker
20 Lake. The federal property abutting the Scott parcel is either Mt.
21 Baker-Snoqualmie National Forest or the Noisy-Diobsud Wilderness. The
22 North Cascades National Park is two miles distant from the Scott
23 parcel.
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27 FINAL FINDINGS OF FACT,
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III

Scott proposes to clear-cut harvest 160 acres of its 600 acre parcel. The timber proposed for harvest, as well adjacent Scott and federal timber, is old growth forest 200 years or older. Scott applied to respondent Washington State Department of Natural Resources (DNR) to conduct the clearcutting and to construct or re-construct a road system to the Lake for the removal of logs. Scott also applied to Whatcom County for a shoreline substantial development permit to barge the logs across the Lake to connect with existing roads there.

IV

Scott actually made several successive applications to DNR for its proposal, each superceding the previous. The DNR checked an earlier application with information contained in a multi-agency computerized record of plant or wildlife species known to exist throughout the state (the TRAX system). The computerized system revealed the presence of Osprey. It did not reveal the presence of Northern Spotted Owl. By memorandum dated December 19, 1986, (Exhibit A-50 herein) however, the Washington Department of Game advised DNR that:

Further review of rare/endangered species information reveals the strong possibility that Spotted Owl are present on the proposed 175 acre harvest unit and further that:

This information is not currently up to date on the data storage system, TRAX. However . . . this is a priority for the Non-Game Team.

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V

Two inspections of the site were conducted by DNR. These resulted in classification of the application as a Class IV special practice subject to review under the State Environmental Policy Act, chapter 43.21C RCW. That classification as Class IV special arose from DNR's concern for potential soil and water impacts. The DNR then developed permit conditions to mitigate the solid and water impacts.

VI

On July 20, 1987, DNR issued a proposed Declaration of Non-Significance (DNS) for Scott's harvest application.

VII

By letter dated July 24, 1987, DNR advised all interested parties and other agencies with jurisdiction of the proposed Determination on Nonsignificance and invited comment until August 7, 1987. The letter advised that the proposed DNS would become final on August 10, 1987, unless a change in that determination was made by DNR subsequent to review of comments.

VIII

In response to DNR's proposed DNS, the Washington State Department of Wildlife (formerly Game) replied in writing and stated:

This agency has met with Scott Paper regarding this proposal and has agreed to assist with the planning of upland leave areas for wildlife. As stated in the checklist, Spotted Owl have been identified approximately one mile from the site; however, while the specie is on the proposed threatened and endangered list for the state, it does not have current statutory protection in private lands. It does remain a specie of concern to WDW.

IX

Whatcom County responded to the proposed DNS by noting that road construction within 200 feet of Baker Lake (incidental to the barging of logs across the Lake) was subject to the shoreline permit process. The County did not object to the DNS.

X

On August 10, 1987, following review of the environmental checklist and comments received, DNR issued a final DNS.

XI

On August 11, 1987, Scott's harvest application (No. FP-1908659) was approved by DNR.

XII

On September 9, 1987, the appellants Seattle Audubon Society and Sierra Club, Cascade Chapter, filed their appeal before us. This appeal challenges the approval of Scott's harvest application on the grounds that the DNS was incorrect.

XIII

The environmental effects of the harvest proposal which appellants raise herein are the effects upon: 1) the Northern Spotted Owl, 2) aesthetics, 3) the Bald Eagle, 4) soil and water, and 5) rare plant species. We now take these steps up in turn.

1 Northern Spotted Owl

2 XIV

3 The habitat of the Northern Spotted Owl consists of old growth
4 forest (200 years or older) at low elevation (below 4,000 feet) with
5 multiple tree canopies and the presence of blown down timber. Such
6 habitat has been greatly diminished by commercial timber harvesting
7 over the past 100 years or more. The practice of clearcutting has
8 been the chief cause of the loss of this habitat.

9 XV

10 In Washington, populations of the Northern Spotted Owl and
11 supporting habitat are principally concentrated in areas of
12 predominantly public land on the Olympic Peninsula and at certain,
13 discrete locations in the Cascade Range.

14 XVI

15 In this case, the Baker Lake impoundment and a number of
16 clearcuts have hemmed in a Spotted Owl habitat of some 5,000 acres.
17 This habitat is known as a "home range" and is separated from other
18 Spotted Owl habitat elsewhere in the Cascade Range. Of the 5,000
19 acres, all are federal public lands except Scott's 600 acres within
20 which the 160 acre clearcut is proposed.

21 XVII

22 The federal public lands in question are managed by the United
23 State Forest Service (U.S.F.S.). At present, certain of these lands
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1 are classified as suitable for timber production. However, that
2 classification is now under review by the U.S.F.S. It has prepared
3 alternative proposals for a management plan and an environmental
4 impact statement. The Northern Spotted Owl is receiving consideration
5 within this federal planning. The preferred management alternative of
6 the U.S.F.S is to eliminate timber harvest and roads from the 5,000
7 acre Spotted Owl habitat.

8 XVIII

9 Clearcutting within the 5,000 acre home range, as Scott proposes,
10 will create fragmentation of that range. As fragmentation occurs, the
11 owl has to move further and spend more energy to forage within the old
12 growth that remains. The risk of predation is also increased of such
13 fragmentation. This affects survivorship of both adult and juvenile
14 owls.

15 XIX

16 Clearcutting within the 5,000 acre home range also converts the
17 habitat from the old growth timber suited to the Spotted Owl into edge
18 habitat more suited to the Barred Owl. Barred Owls are competitors of
19 the Spotted Owl both for food and nesting places. Barred Owls are not
20 a native species of western Washington and have migrated here from
21 Canada. Direct, physical conflicts occur between the two species of
22 owls.

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2 XX

3 There are at least two recorded instances of Spotted Owls
4 responding to calls on Scott's 600 acre parcel. The feather of a
5 Spotted Owl (Exhibit A-45) was found on the Scott parcel within or
6 quite near the 160 acres proposed for clearcut. Spotted Owl responses
7 are recorded in the section of land (Section 12 of Twn. 37 Rg. 9).
8 The latter responses, recorded in 1984, included at least one pair of
9 Spotted Owls.

10 XXI

11 There has been no scientific study to determine whether the 160
12 acres proposed for clearcut contains a nest or preferred feeding area
13 adjacent to the nest known as the "core area". Neither has there been
14 scientific study to learn if the 160 acres includes any primary winter
15 feeding area. If a nest site occurred in the area proposed for
16 harvest, the logging would displace the owls during that year and
17 could cause the nest's failure. Frequency of breeding and
18 survivorship of the young are aspects of the owl's life history which
19 are especially susceptible to negative impact. The breeding pair of
20 owls could abandon the home range if a nest were lost. This could
21 affect the survivorship of that pair. The loss of another pair of
22 Spotted Owls could represent a significant loss for the species.

23 XXII

24 The Northern Spotted Owl was designated by the Washington State
25 Wildlife Commission as an "endangered species" by administrative rule

1 adopted January 15, 1968. WAC 232-12-014. (Washington State Register
2 8-05-032). That rule was promulgated pursuant to RCW 77.12.020(6)
3 which provides:

4 If the director determines that a species of
5 wildlife is seriously threatened with extinction in the
6 state of Washington, the director may request its
7 designation as an endangered species. The commission
8 may designate an endangered species. (Emphasis added.)

8 XXIII

9 Aesthetics. There are two destinations for outdoor recreation
10 on the Lake shore opposite the proposed clearcut. These are the
11 Shannon Creek U.S.F.S. campground (8,500 visitor days per year in
12 1983) and the private Baker Lake Resort (35,000 visitor days per year
13 in 1983). These two destinations accounted for 40% of all visitor
14 days at Baker Lake when surveyed in 1983. The proposed clearcut would
15 be across the Lake from Shannon Creek campground and fully visible
16 from its boat launching area. The proposed clearcut would be
17 partially visible from the Baker Lake Resort. It would be fully or
18 partially visible from different positions occupied by boaters on the
19 Lake.

20 In 1957-58, before Baker Lake was impounded to its present size,
21 Scott harvested what is now Lake bed. After the Lake was impounded in
22 1958-59, 70 acres of that harvest remained above the water line. that
23 70 acres is along the Lake shore of Scott's present 600 acre holding.

1 It has regenerated into mixed small conifers and deciduous trees in
2 the intervening 30 years and is visually attractive. The appearance
3 of the proposed clearcut, for which reforestation is proposed, would
4 also improve over a period of many years.

5 XXIV

6 Bald Eagle. The principal Bald Eagle habitat in the general
7 area under consideration is known and identified as the mouth of the
8 Baker River. This is a concentrated nesting area. Bald Eagles have
9 been extensively studied in this area. Study reveals that the nest
10 closest to the proposed logging is one mile or more away. The closest
11 perch or roost tree is about 1,000 feet away at the mouth of Noisy
12 Creek. While Bald Eagles are seen closer to the site, these sightings
13 are few and primarily in winter. During the summer when proposed
14 harvesting would most likely occur, Bald Eagles move back to the upper
15 end of the Lake.

16 XXV

17 Soil and Water. The road construction or betterment proposed
18 by Scott posed the risk of soil erosion if not done with care. With
19 Scott's apparent agreement, however, DNR specified seven conditions in
20 its approval which relate to endhauling excavated material, keeping
21 stumps out of road foundations, reserving existing stumps from fill,
22 and so forth. (See Exhibit DNR-1). These conditions would be likely
23 to eliminate the risk that erosion might otherwise pose to soil and
24 water.

XXVI

Rare Plant Species. Rare plant species are listed, categorized, and their known locations recorded in the Natural Heritage Data System, a cooperative effort of DNR and the Department of Wildlife's Nongame Program. Neither the Natural Heritage System nor other evidence on this record discloses the presence of any sensitive, threatened or endangered plant species on or in the vicinity of the proposed timber harvest.

XXVII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

There are two issues presented for decision in this matter:

1. Whether the Declaration of Non-Significance (DNS) issued by the Department of Natural Resources (DNR) in connection with this Forest Practices application was clearly erroneous in light of the entire record and all of the evidence?

2. Whether the record for the Declaration of Non-Significance can properly include materials not made available for public review or materials prepared subsequent to the DNS?

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2 II

3 As to the second issue, concerning content of the record for a
4 Declaration of Non-significance (DNS), we decline to decide the issue
5 on the grounds that it is moot. There has been no showing in this
6 case that Department of Natural Resources (DNR) either considered
7 material not made available to the public or materials prepared after
8 the DNS and therefore the issue can have no bearing on this case.

9 III

10 The first issue is whether the DNS was clearly erroneous. More
11 thoroughly stated, the question posed is whether the DNS was:

12 " . . . clearly erroneous in view of the
13 entire record as submitted and the public policy
14 contained in the act of the legislature authorizing
15 the decision or order . . . "

16 Norway Hill v. King County Council, 87 Wn.2d 267, 274, 552 P.2d 674,
17 678 (1976). On review, this standard gives "substantial weight" to
18 the agency determination as required by RCW 43.21C..090 Id. at p.275
19 (P.2d, p. 679). A DNS can be held to be "clearly erroneous" if,
20 despite supporting evidence, it appears on review that "a mistake has
21 been committed". Id. at p.275 (P.2d p.679) citing Stempel v.
22 Department of Water Resources, 82 Wn.2d 109, 114, 508 P.2d 166, 169
23 (1973).

24 IV

25 In applying the clearly erroneous standard set forth above, we
26 are also cognizant of the following:

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
FPAB No. 87-5

1 "Generally, the procedural requirements of SEPA,
2 which are merely designed to provide full environmental
3 information, should be invoked whenever more than a
4 moderate effect on the quality of the environment is a
5 reasonable probability."

6 Norway Hill, supra, at p.278 (P.2d at p.680).

7 V

8 In the present case, after determining that no environmental
9 impact statement was required, DNR approved clearcutting of old growth
10 timber within a distinct home range (5,000 acres) of the Northern
11 Spotted Owl, a species threatened with extinction in the State of
12 Washington. Spotted Owls, including a breeding pair, have been
13 located in close proximity to the proposed clearcut. The clearcut
14 removal of old growth timber has been the chief cause of habitat loss
15 and that loss has lead to the precarious status of the Spotted Owl.

16 We conclude that the proposed clearcut raises a reasonable
17 probability of more than a moderate effect on the quality of the
18 environment; and, therefore, we are left with the definite and firm
19 conviction that a mistake has been committed. The DNR's determination
20 that an environmental impact statement was not required was clearly
21 erroneous. This is so in light of the public policy of SEPA favoring
22 consideration of environmental values based on full consideration
23 before a decision is made. See, Norway Hill, supra, a p.279 (P.2d at
24 p.681).

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2 VI

3 Review proceedings before this Board, an independent
4 administrative tribunal, are not confined to the original record
5 considered by DNR. WAC 223-08-177. The record in this review
6 contains evidence that was not before DNR. Therefore, in reaching our
7 conclusion that DNR's determination was clearly erroneous we
8 acknowledge the more extensive nature of the record before us.

9 VII

10 The DNR's threshold determination was also clearly erroneous with
11 regard to the scope of the proposal. Under WAC 197-11-784 of the
12 rules implementing SEPA, the "proposal" exists when an agency is
13 presented with an application and the environmental effects can be
14 meaningfully evaluated. Scott's proposal, supported with applications
15 to both DNR and Whatcom County, was not only for timber harvest, but
16 also for timber transport, once harvested. Scott urges that its
17 application to Whatcom County to allow barging the logs across Baker
18 Lake is only one transportation alternative, and that an over-land
19 road or helicopter transport could also be used. Yet any of these
20 transportation routes are part of the overall proposal under WAC
21 197-11-784 which provides that:

22 "A proposal may therefore be a particular or
23 preferred course of action or several alternatives.
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1 See, also R.L. Settle, The Washington State Environmental Policy Act,
2 (1987) at p.73. Scott's proposed timber harvest cannot proceed
3 without transportation and the actions necessary for transportation
4 cannot logically be undertaken in the absence of the timber harvest.
5 Under WAC 197-11-060(3)(b)(i) or (ii) of the SEPA rules¹ both
6 harvest and transportation should have been discussed in the same
7 environmental checklist and threshold determination and now should be
8 addressed in the same environmental impact statement.²
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12 1 WAC 197-11-060(3)(b)(i) and (ii) provide:

13 (b) Proposals or parts of proposals that are related to each other
14 closely enough to be, in effect, a single course of action shall be
15 evaluated in the same environmental document. (Phased review is
16 allowed under subsection (5).) Proposals or parts of proposals are
17 closely related, and they shall be discussed in the same environmental
18 document, if they:

19 (1) Cannot or will not proceed unless the other proposals (or parts
20 of proposals) are implemented simultaneously with them; or

21 (ii) Are interdependent parts of a larger proposal and depend on the
22 larger proposal as their justification or for their implementation.
23

24 2 As lead agency DNR is not limited, under SEPA, to considering
25 only those impacts over which it has jurisdiction. WAC
26 197-11-060(4)(b). Thus it should address the impacts of barging or
27 other transportation in the EIS which may then be considered by other
28 agencies, such as Whatcom County. Likewise, DNR is not limited, under
29 SEPA, to considering only the Class IV Special segments of a series of
30 actions physically and functionally related to each other. WAC
31 197-11-305(1)(b)(i) or (ii). Thus, it should address in the EIS the
32 impacts of constructing any road which connects to the harvest site
33 (including the four mile shoreline segment) for the transportation of
34 logs from the site.

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VIII

8 Since the threshold determination made by DNR was clearly
9 erroneous, the approval of Scott's proposed forest practices should be
10 vacated and the matter remanded to DNR for preparation of an
11 environmental impact statement on the entire proposal including timber
12 harvest and transport.

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IX

19 Upon remand, the scope of the EIS must be determined with further
20 opportunity for public comment, WAC 197-11-408. For the guidance of
21 the parties, however, we would make these observations based on the
22 evidence in this appeal. First, the impact of the proposal upon the
23 Northern Spotted Owl is a greater cause for concern than the other
24 impacts identified in this appeal. Second, SEPA requires not only a
25 consideration of the direct impact of harvesting these 160 acres of
26 Spotted Owl habitat but also the likelihood that the present proposal
27 will serve as a precedent for future actions, WAC
197-11-792(2)(C)(iii). In the present case, an EIS on Scott's harvest
should give consideration to the precedential or cumulative effect
within the 5,000 acre Spotted Owl home range (see Exhibit R-55) where
the Scott harvest is proposed. Federal ownership of the balance of
this home range should prompt state and federal cooperation in
identifying these precedential or cumulative impacts.

X

In summary, the DNS in this matter was clearly erroneous. An environmental impact statement should have preceded either the granting or denial of Scott's proposal.

XI

Any Finding of Fact deemed to a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

The approval by Department of Natural Resources of Scott Paper Company's proposed forest practices is hereby vacated, and the matter is remanded for further proceedings consistent with this decision.

DONE at Lacey, WA, this 8th day of March, 1989.

FOREST PRACTICES APPEALS BOARD

Norman L. Winn
NORMAN L. WINN, Chairman

Claudia K. Craig
(See Dissenting Opinion)
CLAUDIA CRAIG, Member

Dr. Martin Kaatz
DR. MARTIN KAATZ, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
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(17)

1 Claudia K. Craig, Member

2 Dissenting Opinion

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5 I respectfully dissent from the majority opinion that the Declaration
6 of Non-Significance is clearly erroneous. I would affirm both the DNS
7 and the Department of Natural Resources' (DNR) approval of Scott Paper
8 Company's proposed forest practices application. In light of the
9 entire record and evidence presented, the probable effect of the
10 proposed operation would be less than moderate upon soil and water,
11 rare plant species, aesthetics and bald eagles.

12 The record and evidence presented with regard to the northern
13 spotted owl does not indicate that there would be a reasonable
14 probability of more than a moderate effect on it as a result of the
15 proposed Scott Paper Company forest practice. Testimony presented to
16 the Board consisted largely of descriptions of the general plight of
17 northern spotted owl populations in the State of Washington, its life
18 habits, and general descriptions of its preferred habitat and use of
19 that habitat.

20 The Scott Paper Company property meets the general criteria of
21 spotted owl habitat, and it abuts Forest Service property which has
22 been designated as a Spotted Owl Habitat Area (SOHA). However, there
23 is no conclusive evidence that spotted owls do indeed reside there.

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26 DISSENTING OPINION

27 FPAB No. 87-5

(1)

1 This spotted owl home range on the south shore of Baker Lake is
2 approximately 5,000 acres; Scott Paper proposes to cut 160 acres of
3 this, or about three percent of the total home range identified. The
4 evidence shows that a spotted owl home range can consist of at least
5 three percent or more habitat that is not old growth forest. The
6 probable result of the proposed logging is that any resident spotted
7 owls no longer able to use that 160 acres, whether for foraging,
8 nesting or winter range would be able to find suitable habitat
9 elsewhere in the same home range. It has not been shown that
10 mortality would result, or that breeding patterns would be interrupted
11 by the proposed action. None of the expert witnesses had an opinion
12 as to the number of spotted owls required to insure a minimum viable
13 population in order to maintain the species.

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15 There are factors with regard to this specific piece of property
16 which indicate that it is less than prime habitat potential for
17 spotted owls. This home range is isolated from other spotted owl home
18 ranges in the state. It is fragmented due to previous clearcut
19 logging in the area and to the presence of Baker Lake. The spotted
20 owl is an "interior species" and generally avoids edge areas, such as
21 that presented by the presence of Baker Lake. The proposed forest
22 practice would take place on the edge of the home range, adjacent to
23 an older clearcut next to the lake. Additionally, Baker Lake lies at
24 the northern fringe of the spotted owl's natural distribution.

1 Baker Lake is a prime area for invasion by great horned owls, and
2 "edge species" invading from Canada. Both Mr. Vaughn and Dr. Brewer
3 testified to the effect that there are large numbers of great horned
4 owls north of Baker Lake. It appears likely that, whether or not
5 there is additional logging of old growth forest at this site, that
6 any resident spotted owls could be displaced by great horned owls.
7

8 The DNR, which does not employ wildlife biologists, in
9 considering the effects of the proposed forest practices on the
10 northern spotted owl, relied largely on the judgment and comments of
11 the Washington State Department of Wildlife (WDW), which does employ
12 wildlife biologists. Mr. Olson testified that the DNR routinely sends
13 forest practices applications to the WDW, among other agencies, and
14 routinely receives responses from them. He testified that WDW does
15 not hesitate to request restrictive conditions on applications to
16 accommodate wildlife needs should their representatives feel they are
17 warranted. In this case, WDW responded to one of Scott Paper
18 Company's predecessor applications and to the DNR's proposed
19 Declaration of Non-Significance. WDW representatives also met with
20 Scott Paper Company employees on the site to plan upland leave areas
21 for wildlife use. At the same time that DNR was receiving and
22 considering agency comments on the proposed Declaration of
23 Non-Significance, the Department of Wildlife was preparing information
24 which would result in the designation of the northern spotted owl as a
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1 state endangered species. Yet, in its response to DNR on the proposed
2 Declaration of Non-Significance, WDW did not request application
3 restrictions. It responded only that the species continued to be of
4 concern.

5 The collective testimony with regard to the northern spotted owl
6 does not demonstrate that the DNR's Declaration of Non-Significance is
7 clearly erroneous solely on the basis of potential impacts on the
8 northern spotted owl. When coupled with RCW 43.21C.090's requirement
9 that substantial weight be given to the agency's decision, I must
10 affirm the Declaration of Non-Significance and issuance of the
11 approved permit application.

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13 DATED this 8th day of March, 1989.

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15 Claudia K. Craig
16 CLAUDIA K. CRAIG, Member
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